(1)

Supreme Court, U.S.
FILED

97 863 NOV 24 1997

OFFICE OF THE CLERK

No. 97-

In the Supreme Court of the United States

October Term, 1997

TAI ANH PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

John Kenneth Zwerling*
Lisa B. Kemler
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-8000
**Counsel of Record*

38 pp

1. QUESTIONS PRESENTED

1. Whether, for purposes of a conviction under 18 U.S.C. Section 924(c)(1), conduct that would not constitute "use" of a firearm, as that term is defined in *Bailey v. United States*, when the predicate offense is a substantive crime can constitute "use" when the predicate offense is a conspiracy.

2. Whether, when the Court of Appeals relies on or creates a new theory upon which to sustain a conviction which was never presented to the jury and which the jury never had to resolve in order to convict the defendant, the conviction should be vacated and a new trial granted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (I)

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(C)(1), CONDUCT THAT WOULD NOT CONSTITUTE "USE" OF A FIREARM, AS THAT TERM WAS DEFINED IN *BAILEY*, WHEN THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME CAN CONSTITUTE "USE" WHEN THE PREDICATE OFFENSE IS A CONSPIRACY IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT 9

A. WHETHER THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME OR A CONSPIRACY, TO SUPPORT A CONVICTION UNDER SECTION 924(c)(1) FOR USE OF A FIREARM, THE FIREARM

MUST HAVE BEEN "ACTIVELY EMPLOYED" AS DEFINED BY *BAILEY* OR, AT LEAST, ITS ACTIVE EMPLOYMENT MUST BE PART OF THE AGREEMENT FOR THE COMMISSION OF THE OFFENSE WHICH WAS THE OBJECT OF THE CONSPIRACY 11

B. THE FOURTH CIRCUIT'S INTERPRETATION OF THE "USE" PRONG OF SECTION 924(c)(1) IS NOT A CORRECT APPLICATION OF THE *BAILEY* COURT'S DEFINITION OF "USE" OF A FIREARM 12

C. THE GOVERNMENT FAILED TO PROVE THAT PETITIONER "USE[D]" A FIREARM 15

II. THE QUESTION WHETHER, WHEN THE COURT OF APPEALS RELIES ON OR CREATES A NEW THEORY UPON WHICH TO SUSTAIN A CONVICTION WHICH WAS NEVER PRESENTED TO THE JURY AND WHICH THE JURY NEVER HAD TO RESOLVE IN ORDER TO CONVICT THE DEFENDANT, THE CONVICTION SHOULD BE VACATED AND A NEW TRIAL GRANTED IS AN IMPORTANT QUESTION OF FEDERAL LAW 16

A. THE APPEALS COURT AFFIRMED PETITIONER'S CONVICTION BASED ON A NEW THEORY OF LIABILITY 17

B. THE CREATION OF A NEW THEORY OF LIABILITY ON APPEAL IN COMBINATION WITH ERRONEOUS JURY INSTRUCTIONS

ON AN ESSENTIAL ELEMENT OF THE OFFENSE CAN NOT CONSTITUTE HARMLESS ERROR 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Bailey v. United States, 116 S.Ct. 501 (1995) ..... passim

Johnson v. United States, 117 S.Ct. 1544 (1997) 18

Pinkerton v. United States, 328 U.S. 640 (1946) 6,16

United States v. Chen, __ F.3d __, LEXIS 30038 (4th Cir. October 31, 1997) 19

United States v. Cummings, 937 F.2d 941 (4th Cir.), *cert. denied*, 502 U.S. 48 (1991) 17

United States v. Dean, 59 F.3d 1479 (5th Cir. 1995) 17

United States v. Elder, 88 F.3d 127 (2nd Cir. 1996) .. 7,14

United States v. Harwood, 998 F.2d 91 (2nd Cir. 1993) .. 16

United States v. Hawthorn, 94 F.3d 118 (4th Cir. 1996) .. 8

United States v. Jackson, 65 F.3d 631 (7th Cir. 1995) ... 17

United States v. Masotto, 73 F.3d 1233 (2nd Cir. 1996) 16,17

United States v. Meggett, 875 F.2d 24 (2nd Cir. 1989) ... 7

United States v. Olano, 507 U.S. 732 (1993) 18

United States v. Paz, 927 F.2d 176 (4th Cir. 1991) 6

United States v. Phan, 121 F.3d 149 (4th Cir. 1997) . passim

United States v. Resko, 3 F.3d 684 (3rd Cir. 1993) 17

United States v. Romero, 897 F.2d 47 (2nd Cir. 1990) 16,17

United States v. Rosario, 111 F.3d 293 (2nd Cir. 1997) ... 8

United States v. Smith, 94 F.3d 125 (4th Cir. 1996) 8

Statutes

18 U.S.C. § 1951 ..... passim

18 U.S.C. § 924(c)(1) ..... passim

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 10

PETITION FOR A WRIT OF CERTIORARI

Tai Anh Phan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 121 F.3d. 149. The order denying rehearing en banc (Pet. App. 11a) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying Phan's petition for rehearing was entered on August 26, 1997. Pet. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1) of Title 18 of the United States Code provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

Section 1951 of Title 18 of the United States Code ("Hobbs Act") provides, in pertinent part: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan, or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

STATEMENT

In 1995, Tai Anh Phan was convicted and is presently incarcerated for conspiring to commit a "Hobbs Act" violation and for conduct - purportedly "using" a firearm by merely "discussing the need to carry firearms during the robbery with his criminal associates and provid[ing] [one co-conspirator] with two loaded handguns." (Pet. App. 5a). And, "on the day of the intended robbery, [one co-conspirator] transferred the handguns to [another co-conspirator], who then placed them under the seat of the [van] in which the conspirators traveled" to the place of the intended robbery. (Pet. App. 5a). The court of appeals held that this conduct constituted "active employment" within the meaning of this Court's decision in *Bailey v. United States*, 116 S.Ct. 501 (1995), and affirmed Phan's § 924(c)(1) conviction, thereby leaving in tact a five-year sentence which must run consecutive to the 63-month sentence he is serving on the Hobbs Act conspiracy conviction.

1. Phan and three associates were indicted in the United States District Court for the Eastern District of Virginia and charged with conspiracy to commit a robbery in violation of the Hobbs Act, 18 U.S.C. Section 1951, and using firearms during and in relation to a crime of violence in violation of 18 U.S.C. Section 924(c)(1). Prior to trial the three associates

pleaded guilty to the conspiracy to commit a Hobbs Act violation, but not to the Section 924(c)(1) violation. They all testified against Phan at trial; however, they all testified that, despite the presence of two firearms hidden in the van, they did not intend to use them in the commission of the robbery, nor had Phan instructed them to use firearms. The active employment of a firearm in the commission of the planned robbery was never contemplated by the conspirators.

Phan, Khai Bui, Tuan Nguyen, Minh Le and Anthony Wright (a confidential informant for the FBI) agreed to rob a gun dealer (the Mid-Atlantic sales representative for Glock, Inc.) who lived in Maryland and who, according to the informant, kept 400 new Glock handguns in his unsecured garage. The robbery was planned to take place on June 30, 1995. Based on information provided by the informant, the conspirators believed that the only person who would be home at the time of the robbery would be the gun dealer's teen-aged daughter. The plan called for Bui to drive a van with Nguyen and Le and they would follow the informant from Virginia to the gun dealer's home in Maryland. When they got to the home, the informant was supposed to go into the home first (disguised as a flower delivery man) and Bui was supposed to pull the van up to the garage so that the guns could be loaded into the van. Bui testified that if anyone other than the gun dealer's daughter was present in the home, the robbery was to be called off. (Tr. 11/7/95 at 198).

All three conspirators -- Bui, Nguyen and Le -- testified that there was never a plan or intent to use firearms in the robbery. (*Id.* at 198). Nguyen testified that on June 25, 1995, while he was at the Zei Club celebrating a friend's birthday, he met Phan outside the club and that Phan gave him two firearms to hold for him which Nguyen put into a friend's car. There was no mention of the proposed robbery when this event

allegedly occurred. (*Id.* at 141). Later that evening when he was leaving the club, Nguyen did not see Phan, so he took the two firearms home with him. (*Id.* at 142). In contrast, Bui testified that he went with Phan on June 25 to the Zei Club and that he did not see Phan bring any packages with him or carry any firearms that night. Bui testified further that Nguyen and Le were not at the Zei Club when he and Phan arrived. He further testified that he never saw Phan leave the club with Nguyen that evening, nor was he aware of Phan giving Nguyen any firearms that evening. (*Id.* at 191-92).[1]

On the morning of June 30, 1995, Bui met with Phan and the informant at Phan's house. Before Bui and the informant left to pick up Le and Nguyen, Phan gave Bui duct tape, a pair of gloves and a hundred dollar bill to buy flowers for the informant to use in his rouse to enter the gun dealer's home. (*Id.* at 179-83). The informant testified that Phan gave him a three-ring binder to use as a pretend delivery log. Bui testified that when he picked up Nguyen and Le in Phan's van, Nguyen gave him a shirt with two firearms wrapped in it. Bui put the package Nguyen gave him on the floor between the seats of the van. (*Id.* at 185). There was no evidence that Bui or Le had any prior knowledge of how or when Nguyen obtained the two firearms or that firearms were to be transported in the van. In fact, Le testified that he was unaware that there were any firearms in the van until after his arrest. (*Id.* at 114-15).

---

[1] The Fourth Circuit relied upon this alleged transfer of the firearms even though it was a contested issue and the question of whether or not this transfer ever took place was not one that the jury had to resolve in order to convict Phan under the trial court's pre-*Bailey* instructions. See Petition, *infra*. Furthermore, even if it did occur, Nguyen testified that this transfer had nothing to do with the robbery. [In fact, he did not join the conspiracy until four (4) days later.]

When the conspirators drove near the gun dealer's home, they suspected that there might be people in the house other than the daughter. Nguyen testified he told Bui to abort the robbery. Bui then drove past the gun dealers house and made a U-turn. (*Id.* at 148-49). As they were leaving the area, they were arrested. A search of the van disclosed the two loaded firearms located underneath the front passenger seat still wrapped in a white T-shirt. (*Id.* at 55-56).

Consistent with then-existing precedent, the trial court, without objection, gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c)(1):[2]

> The phrase "uses or carries a firearm" means having a firearm or firearms available to assist or aid in the commission of the crime alleged, in this case, in Count 1 of the indictment.
>
> In determining whether the defendant used or carried a firearm, you may consider all of the factors received in evidence in the case, including the nature of the underlying crime of violence or ***the proximity of the defendant or his co-conspirators to the firearm*** in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm. Of course, in this case, it's alleged there were two firearms.
>
> The Government is ***not required to show that the defendant actually displayed or fired the weapon***. The Government is required,

---

[2] Phan was only charged with "using" firearms, not "using or carrying."

> however, to prove beyond a reasonable doubt that ***the firearm was in the defendant's possession or under the defendant's control or under the possession and control of one of the defendant's co-conspirators*** -- this relates back to one of the other instructions I gave you previously -- at the time that the crime of violence was committed or attempted. (Emphasis added). (Tr. 11/8/95 at 212-14).

The other instruction the trial court referred to was an instruction based on *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds that a conspirator can be held liable for the overt acts of every other conspirator committed in furtherance of the conspiracy and, therefore, can be convicted of substantive offenses committed during the course of the conspiracy.

On November 8, 1995, Phan was convicted of a conspiracy to commit a Hobbs Act violation and "using" firearms in violation of Section 924(c)(1). On January 26, 1996, Phan was sentenced to 123 months - 63 months for the conspiracy and 60 months (to be served consecutively) for the Section 924(c)(1) conviction.

2. Phan appealed his convictions to the Fourth Circuit. Because neither he, nor any of his co-conspirators, had "used" a firearm as this Court interpreted that term in *Bailey*, Phan sought to have his Section 924(c)(1) conviction reversed based on insufficient evidence. At the time of Phan's conviction, the Fourth Circuit -- like the majority of courts -- interpreted the term "use" in Section 924(c)(1) to include mere possession or proximity. *See United States v. Paz*, 927 F.2d 176, 178-79 (4th Cir. 1991). Approximately one month after Phan's trial and conviction, this Court issued its decision in

Bailey, substantially narrowing the range of conduct that could constitute "use" for purposes of a Section 924(c)(1) conviction. The Court held that "'use' must connote more than mere possession of a firearm" and that to "use" a firearm within the meaning of Section 924(c)(1), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, . . . firing or attempting to fire" the weapon. *Id.* at 506, 508-09. The Court, thus, overruled those circuit court opinions in which the only nexus required between the firearm and the predicate offense was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the predicate offense. *Id.* at 506, 508.

The Fourth Circuit, finding that the "relevant question" before it was "whether Phan actively employed the handguns during and in relation to the conspiracy, not whether the handguns were actively employed during and in relation to the robbery[,]" noted that *"Bailey* offers only imperfect guidance." (Pet. App. 7).[3] In answering the question it posed in the affirmative, the Fourth Circuit relied on *United States v. Elder*, 88 F.3d 127 (2nd Cir. 1996), which held that a Hobbs Act conspiracy to commit armed robbery is a proper predicate offense for a Section 924(c)(1) conviction. In *Elder*, however, it was not difficult to conclude that the defendant had actively employed a firearm in the course of the conspiracy since he stipulated that, as a member of a Hobbs Act conspiracy, he participated in 16 truck hijackings or attempted hijackings and repeatedly "brandished a firearm," during three of the hijackings. *Id.* at 129. In addition to *Elder*, the Fourth Circuit cited *United States v. Meggett*, 875 F.2d 24, 29 (2nd Cir. 1989), for the proposition that the use of a firearm need not occur in connection with the ultimate object of the conspiracy in order to support a Section 924(c)(1) conviction. But *Meggett* is a

---

[3] No robbery occurred in this case.

pre-*Bailey* case whose holding was rejected by the Second Circuit in *United States v. Rosario*, 111 F.3d 293, 300 (2nd Cir. 1997).

In affirming Phan's Section 924(c)(1) conviction, the Fourth Circuit held that "[i]n the context of the inchoate crime of conspiracy to commit robbery, . . . the giving of firearms to a fellow conspirator constitutes active employment." (Pet. App. 8a). Disregarding the fact that each of the co-conspirators testified at trial that no one intended to use firearms in the intended robbery and that there was no evidence that the conspirators agreed to use of firearms in the robbery, the court of appeals found that "[t]he transfer of the handguns was done in ***preparation*** for their ***eventual use*** during the robbery. In other words, the active employment of the handguns was in itself an overt act in furtherance of the conspiracy." (Pet. App. 8a). (Emphasis added).

Phan petitioned for rehearing, arguing as he had at the oral argument that his conviction for using firearms in violation of Section 924(c)(1) should be reversed based on insufficient evidence. In addition, Phan argued that this conviction should be reversed and remanded for a new trial based on the trial court's erroneous jury instructions. As to his latter ground, Phan relied upon then controlling Fourth Circuit precedent -- *United States v. Hawthorne*, 94 F.3d 118 (4th Cir. 1996), and *United States v. Smith*, 94 F.3d 125 (4th Cir. 1996). In each of those cases, the Fourth Circuit vacated the defendants' Section 924(c)(1) convictions on the grounds that the jury had been erroneously instructed on the pre-*Bailey* definition of "use." Phan also argued that the theory upon which the appeals court found that Phan had "used" the firearms within the meaning of Section 924(c)(1) was a novel theory that was never presented to the jury and, in any event, was based on a contested factual allegation which, due to the faulty jury instructions, the jury

never had to resolve. The government's theory at trial, as presented in its closing argument, was that Phan was guilty of violating Section 924(c)(1) because the conspirators possessed the firearms in the van and they were available for their use. (Tr. 11/8/95 at 784).

The court of appeals denied Phan's petition for rehearing and suggestion for rehearing en banc on August 26, 1997.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(c)(1), CONDUCT THAT WOULD NOT CONSTITUTE "USE" OF A FIREARM, AS THAT TERM WAS DEFINED IN *BAILEY*, WHEN THE PREDICATE OFFENSE IS A SUBSTANTIVE CRIME CAN CONSTITUTE "USE" WHEN THE PREDICATE OFFENSE IS A CONSPIRACY IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT

If the Fourth Circuit's decision is a correct interpretation of the meaning of the term "use" in Section 924(c)(1), then this Court's decision in *Bailey* has been gutted. This case presents an important question. It has the potential to affect every conspiracy which qualifies as a predicate offense under Section 924(c)(1) where firearms are present or possessed but not "actively employed." Based upon the Fourth Circuit's reasoning, a person can be convicted of violating Section 924(c)(1) when the predicate offense is a conspiracy and where the evidence shows that the firearm was merely acquired and possessed by one or more conspirators.

The Fourth Circuit complained in its opinion that the *Bailey* decision provided it with little guidance in deciding what conduct constitutes "use" of a firearm within the meaning of Section 924(c)(1) where the underlying crime is a conspiracy as opposed to a substantive crime. Seizing the language in *Bailey* where the Court stated that "'use' takes on different meanings depending on context" (*Bailey*, 116 S.Ct. at 508), the Fourth Circuit concluded that, "in the context of the inchoate crime of conspiracy to commit robbery, .. . the giving of firearms to a fellow conspirator constitutes active employment." (Pet. App. 8a). As we explain below (Pet., Section IB, *infra*), the Fourth Circuit's interpretation is not a correct reading of *Bailey* and if it remains the law, will result in an expansion of the range of conduct that may constitute "use" for purposes of a Section 924(c)(1) conviction, including conduct which this Court specifically rejected in *Bailey*.

The question presented by this case is an important question of federal law. Since *Bailey* was decided, the courts of appeals have been faced with numerous cases involving Section 924(c)(1) convictions either on direct appeal or collateral challenges to convictions under 28 U.S.C. § 2255, and they are still grappling with the term "use." The case herein presents the Court with an opportunity to clarify this matter once and for all and to provide needed guidance to the lower federal courts to determine whether the facts are sufficient to support a Section 924(c)(1) conviction for use of a firearm during or in relation to a drug crime or a crime of violence, whether the predicate offense is a substantive crime or a conspiracy to commit that substantive crime. Due to the severe penalties that result from one or more convictions for a

violation of Section 924(c)[4] and the frequency that firearms are possessed, but not actively employed, in the course of conspiracies to commit a drug crime or a crime of violence, there is a need to limit the reach of this added punishment to only those situations for which Congress intended it to apply.

A. Whether The Predicate Offense Is A Substantive Crime Or A Conspiracy, To Support A Conviction Under Section 924(c)(1) For Use Of A Firearm, The Firearm Must Have Been "Actively Employed" As Defined By *Bailey* Or, At Least, Its Use Must Have Been Part Of The Agreement For The Commission Of The Offense Which Was The Object Of The Conspiracy.

As stated previously, in *Bailey* this Court held that the term "use" in Section 924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S.Ct. at 505. In explaining what Congress meant by "active employment," the Court suggested conduct such as "brandishing, displaying, bartering, striking with, . . ., firing or attempting to fire, a firearm." *Id.* at 508. In so holding, the Court specifically rejected the government's position that mere possession of a firearm for intended or potential use during the commission of a predicate offense qualifies as "use." The Court stated ". . ., liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later if necessary." *Id.* at 507. The Court even ruled out conduct such as "storage of

---

[4] Section 924(c)(1) provides, in part, that "[i]n the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release."

a firearm" or concealment of a firearm "to be at the ready of an imminent confrontation" as constituting "use" within the meaning of Section 924(c)(1). The Court reasoned that "[s]torage of a firearm, without its more active employment, is not reasonably distinguishable from possession" and, with respect to the concealment scenario, where the firearm "is not disclosed or mentioned by the offender, it is not actively employed, and it is not "'used.'" *Id.* at 508.

To sustain a conviction under Section 924(c)(1), it is submitted that whether the predicate offense is a substantive crime, as was the case in *Bailey*, or an inchoate crime, such as the conspiracy charged in the case herein, the same analysis of whether the facts support a finding of "use" of a firearm must apply. The *Bailey* Court made no distinction between a substantive crime or an inchoate crime, rather the Court's analysis focused on the meaning of the term "use." If "put[ting] a gun into place to protect drugs or to embolden [oneself]" was not enough to constitute active employment within the context of a substantive crime (*Bailey*, 116 S.Ct. at 508), then there is no reason that agreeing to put a firearm into place to protect or embolden the participants should be sufficient within the context of a conspiracy.

B. The Fourth Circuit's Interpretation Of The "Use" Prong Of Section 924(c)(1) Is Not A Correct Application Of The *Bailey* Court's Definition Of "Use"

The Fourth Circuit, in affirming Phan's Section 924(c)(1) conviction, held that, even though the firearms were not actually "used" as that term was defined in *Bailey* by any member of the conspiracy in the commission of a crime of violence, merely having the firearms available as part of the plan is enough where the underlying crime charged is a conspiracy to commit robbery. If this is a correct interpretation

of *Bailey* then every conspiracy to commit a drug offense or violent crime where a firearm was kept at the ready in case of a confrontation will carry the added penalty for "use" of a firearm as was the case pre-*Bailey*.[5]

Stating that it did not have to find that Phan, or even a co-conspirator, actively employed firearms in one of the ways listed in *Bailey*, the Fourth Circuit mistakenly found solace in the *Bailey* Court's language that "'use' takes on different meanings depending on context." *Bailey*, 116 S.Ct. at 508. In relying on this language to distinguish a substantive crime from an inchoate crime, the Fourth Circuit disregarded the context to which the *Bailey* Court referred. In discussing the meaning of the term "use," this Court referred to an example: "I use a gun to protect my house, but I've never had to use it." The Court then explained:

> In the first phrase of the example, "use"refers to an ongoing, inactive function fulfilled by a firearm. It is this sense of "use" that underlies the Government's contention that "placement for protection" -- i.e., placement of a firearm to provide a sense of **security** or to embolden -- constitutes a "use." It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this reading, mere possession of a firearm by a drug offender, at or near the site of a drug crime or

---

[5] The United Sentencing Guidelines ("U.S.S.G.") already provide a significant additional punishment for possession of a firearm during the commission of drug or Hobbs Act conspiracies that do not involve active employment of the firearm. See U.S.S.G. Sections 2D1.1(b)(1) and 2B3.1(b)(2)(C) which permit a 2-level and 5-level enhancement, respectively, in a defendant's base offense level where a firearm was possessed during a drug or Hobbs Act violation.

> its proceeds or paraphernalia, is a "use" by the offender. Because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the inert **presence** of a firearm, without more, is not enough to trigger § 924(c)(1) merely for storing a weapon near drugs or drug proceeds.

Id. (Emphasis added).

The factual basis for the Fourth Circuit's ruling falls exactly within the type of conduct this Court found could not constitute "use"-- "[t]he transfer of the handguns was done in preparation for their eventual use during the robbery." (Pet. App. 8a).

In *Elder*, the case relied on by the Fourth Circuit, the defendant challenged his conviction for using and carrying a firearm during and in relation to a Hobbs Act conspiracy. *Elder*, 88 F.3d at 127. The Second Circuit held that where the defendant "has 'used' his firearm, as that term is elucidated in *Bailey*, . . ., ***in connection with a violent crime that was a goal or modus operandi of the conspiracy***, that conspiracy may properly serve as a predicate felony for a charge under § 924(c)." *Id.* at 129. (Emphasis added). It is clear from the facts in *Elder* that the active employment of firearms was part of the agreement since firearms were brandished during several of the Hobbs Act robberies and the brandishing of the firearms were overt acts of the conspiracy. Thus, it is clear that, unless the conduct involving the firearm in connection with the predicate offense (substantive or inchoate) constitutes "active employment" as defined by *Bailey*, a Section 924(c)(1) conviction can not be sustained.

C. The Government Failed To Prove That Petitioner "Use[d]" A Firearm

There was no evidence that Phan or any of the co-conspirators ever "used" a firearm as that term was defined in *Bailey*. While only one of Phan's three co-conspirators testified that Phan gave him two firearms to hold and that, on the day of the planned robbery, Phan told him to take the firearms and give them to the person who picked him up (Tr. 11/7/95 at 442), all of the conspirators consistently testified that they never intended to use firearms in the commission of the robbery. Moreover, there was no evidence that Phan and the other conspirators had ever agreed to actually employ firearms during the robbery. There was no evidence that Phan or any of the conspirators brandished, displayed, fired, pointed, or otherwise actively employed either of the two firearms found in the van "during and in relation to" the predicate offense of conspiracy to commit a Hobbs Act violation. Assuming co-conspirator Nguyen's testimony to be true that Phan gave him the two firearms to hold and that on the day of the planned robbery Phan told him to give the firearms to the person who picked him up, this conduct does not constitute active employment as defined in *Bailey*. It is submitted that, under *Bailey*, conduct that would have qualified as "use" within the meaning of Section 924(c)(1) could have consisted of conduct such as Phan using a firearm to coerce a reluctant co-conspirator into committing the robbery or one or more of the conspirators actually brandishing a firearm in the commission of the robbery or had the plan called for someone to actively employ firearms during the robbery-- the intended object of the conspiracy. No such conduct occurred in this case. Under the circumstances of this case, Phan plainly did not violate Section 924(c)(1) and his conviction should be reversed.

II. THE QUESTION WHETHER, WHEN THE COURT OF APPEALS RELIES ON OR CREATES A NEW THEORY UPON WHICH TO SUSTAIN A CONVICTION WHICH WAS NEVER PRESENTED TO THE JURY AND WHICH IS BASED ON CONTESTED FACTUAL ALLEGATIONS WHICH THE JURY NEVER HAD TO RESOLVE IN ORDER TO CONVICT THE DEFENDANT, THE CONVICTION SHOULD BE VACATED AND A NEW TRIAL GRANTED IS AN IMPORTANT QUESTION OF FEDERAL LAW

The jury that convicted Phan on the Section 924(c)(1) charge was presented with only one theory for conviction; that is, he was guilty of "using" firearms based on the presence of firearms, the proximity of Phan or his co-conspirators to the firearms, and the possession of firearms by Phan or his co-conspirators. The jury's verdict convicting Phan for using firearms in violation of Section 924(c)(1) is a direct result of the trial court's erroneous instructions which permitted a conviction based on "the proximity" of Phan or his co-conspirators to the firearm and their possession of the firearm (Tr. 11/8/95 at 818). In addition, the trial court's *Pinkerton* instruction permitted a conviction based upon a theory of vicarious liability.[6] (Tr. 11/7/95 at 208). Although the courts of appeals have permitted a jury to be instructed on the *Pinkerton* theory of liability in connection with a Section

---

[6] To convict a defendant under a *Pinkerton* theory of liability, "the jury must [have found] that the defendant was a member of a conspiracy" and that "the offenses committed by his co-conspirators were reasonably foreseeable consequences of ***acts furthering the unlawful agreement.***" *United States v. Masotto*, 73 F.3d 1233, 1241-42 (2nd Cir. 1996), quoting *United States v. Harwood*, 998 F.2d 91, 100 (2nd Cir. 1993), and *United States v. Romero*, 897 F.2d 47, 51 (2nd Cir. 1990). (Emphasis added).

924(c) charge,[7] the facts still must support a finding of active employment. See e.g., *United States v. Masotto*, 73 F.3d 1233, 1242 (2nd Cir. 1996), where the defendant was convicted, *inter alia*, of a conspiracy to commit a robbery in violation of the Hobbs Act and a Section 924(c)(1) violation based on a *Pinkerton* theory of liability. In that case, based in part on the testimony of a co-conspirator that he and another conspirator, during a hijacking of a truck, used a gun to force the driver out of the truck, the Second Circuit had no difficulty finding that "guns were used to carry out the truck robberies" and, therefore, "the jury could have found that the guns were used in furtherance of the conspiracy to commit robbery." *Id.* This is a far cry from Phan's conduct in merely asking a co-conspirator to hold two firearms for him and then telling that same co-conspirator to give the guns to another co-conspirator. It is not even clear from the evidence why Phan asked Nguyen to hold the firearms for him or why he had Nguyen give them to Bui.[8]

A. The Appeals Court Affirmed Petitioner's Conviction Based On A New Theory Of Liability

On appeal, however, the Fourth Circuit created a new theory of liability for a Section 924(c)(1) conviction when the predicate offense is a conspiracy and the object of the

---

[7] See *United States v. Romero*, 897 F.2d at 51; *United States v. Jackson*, 65 F.3d 631 (7th Cir. 1995); *United States v. Dean*, 59 F.3d 1479 (5th Cir. 1995); *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993); *United States v. Cummings*, 937 F.2d 941 (4th Cir.), *cert. denied*, 502 U.S. 948 (1991).

[8] Since there was never any discussion among the conspirators that firearms would be used in the robbery, it is conceivable that Phan merely wanted to get back the two firearms he had previously given to Nguyen. There is simply no evidence to support a finding that the guns were used in furtherance of the conspiracy to commit robbery in this case.

conspiracy – in this case, a robbery – is not committed. Under these circumstances, the Fourth Circuit held that "*Bailey* can only be applied in a more general sense." (Pet. App. 7a). Contrary to the teaching of *Bailey*, the Fourth Circuit held that "the giving of firearms to a fellow conspirator constitutes active employment" where the transfer "was done in preparation for their eventual use during the robbery." (Pet. App. 8a). The Fourth Circuit's analysis not only blurs the distinction between "use" and "carry," but it is completely at odds with the holding in *Bailey* where this Court stated that there is no Section 924(c)(1) liability for cases involving "intended use, as when an offender places a firearm with the intent to use it later if necessary." *Bailey*, 116 S.Ct. at 507.

B. The Creation of A New Theory Of Liability On Appeal In Combination With Erroneous Jury Instructions On An Essential Element Of The Offense Can Not Constitute Harmless Error

Where, as here, the trial court misinstructed the jury regarding an essential element of the offense and the appellate court, in order to affirm a defendant's conviction, relies on or creates a new theory of liability which was never presented to the jury, the error can not constitute harmless error. The jury instruction given by the trial court regarding the definition of "use" of a firearm was plainly erroneous in light of *Bailey*. The misinstruction in combination with the appellate court's creation of a new theory of liability to support a Section 924(c)(1) conviction clearly affected the substantial rights of Phan. *United States v. Olano*, 507 U.S. 725, 732 (1993).[9] It can not be said that the trial court's "misinstruction on 'use'

---

[9] In *Johnson v. United States*, 117 S.Ct. 1544 (1997), this Court stated that misinstructing the jury on an essential element of the offense is "an error that which is subject to harmless error analysis." 117 S.Ct. 1550.

was 'unimportant' in relation to everything else the jury considered on the issue in question." *United States v. Chen*, F.3d _, LEXIS 30038, *33 (4th Cir., October 31, 1997) (en banc) (Williams, J., concurring opinion) (citation omitted). In *Chen* the Fourth Circuit found the misinstruction to be harmless error, however, the defendants clearly actively employed firearms by holding hostages captive at gunpoint. As there was no active employment of firearms in Phan's case, at a minimum, he is entitled to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Kenneth Zwerling*
Lisa B. Kemler
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-7900
**Counsel of Record*

November 1997